Competition policy and
Bill C-91

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COMPETITION POLICY AND BILL C-91, COMPETITION TRIBUNAL ACT

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25 April 1986

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INTRODUCTION

The pursuit of profit by business is an act of self-interest, but, ever since Adam Smith, economists have recognized that, in certain circumstances, self-serving behaviour is socially desirable. The profit motive can ensure the production of the right sorts of goods in the correct quantities as cheaply as possible. The problem of competition policy is to detail the circumstances in which the pursuit of profit is not desirable and erect a suitable, corrective legal and administrative framework. Competition acts as a restraint on the profit motive, allowing greater profits to be made only by higher efficiency, or a better product or service. A firm seeking higher profits has two choices: either reduce competition or improve economic performance. Unfortunately, the first choice can often be the more profitable.

Historically,(1) Canada does not have a record of competitive market behaviour. Being a small country next to a large, and perhaps too powerful, neighbour it imposed tariffs to protect infant industries. These tariffs, however, allowed price-fixing and market-sharing. Before the Second World War, Canadian trade associations, unlike their American counterparts, were, on the whole, devoted to the exchange of price lists rather than the dissemination of technical innovations.

In the post-war period, most economists agree that the level of competition in the Canadian economy increased because of lower tariffs and more import penetration, but that, even so, Canadian industry was more concentrated, more oligopolistic and less competitive than comparable U.S. industry.

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(1) See, for example C. Green, Canadian Industrial Organization and Policy, 2nd ed., McGraw-Hill Ryerson, Toronto, 1985, p. 153-156.

The classical framework for the analysis of industrial organization presents a cause and effect chain:

STRUCTURE ⟶ CONDUCT ⟶ PERFORMANCE

The target is economic performance, but it is the hardest item to assess directly. An evaluation would require access to commercial data (which are usually kept strictly secret as they would give valuable information to competitors) and substantial economic analysis. Many economists would argue that such analyses are still an art rather than a science. Such investigations would be time-consuming, expensive, and very disruptive to the assumed innocent parties. Attention has therefore turned to the first two links in the chain.

Economists have almost uniformally agreed that monopoly by one firm is bad and that perfect competition, among very many firms, is good.(2) This has led to attempts to set up a numerical scale of industrial concentration ranging between the two extremes and to mark some critical numbers on this scale. Any industrial reorganization that pushed the concentration index over the critical level would be prohibited. Such a numerical scale, if workable, would have some very desirable properties. It would be quick, cheap and almost self-enforcing. For example, two firms that wished to merge could readily compare the concentration index to the critical value to check beforehand that the amalgamation was allowable. There would be no problem of having to "unscramble the eggs" of a merger some considerable time after it had taken place.

The workability of this approach depends on finding an index of concentration that is sufficiently strongly correlated to performance.

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(2) The exception is a natural monopoly such as a telephone system where bigness of itself improves efficiency, and it is costly to provide an alternative service.

A fairly common formula used by economists is to measure the proportion of the market held by the largest four firms. These indices have been computed for Canada,(3) and then examined to see if they show a trend. Similar indices in the U.S. and Europe can then be consulted to see if Canada is comparatively more or less concentrated. The expected causes of high concentration indices, such as plant size, economies of scale, set-up costs, degree of advertising and other relevant variables have been statistically tested.

Concentration indices do not seem to be sufficiently highly correlated to the other standard factors considered in concentration studies (such as barriers to entry to the market) and they are less reliable statistically than economists prefer. For these reasons economists have moved away from thinking that the link between structure and conduct is a strong enough basis for competition policy.(4)

Dealing with the conduct of a firm has certain advantages. Conduct is usually observable; there will be contracts, price lists and business correspondence available for the investigator. Conspiratorial acts themselves occur in secret, but their effects in the marketplace are readily observable, and reasonable inferences can be made.

One difficulty is that the shading between an act which is highly competitive and one which is anti-competitive in that it attempts to force a competitor out of the market, is a matter of sophisticated judgment requiring acumen in business affairs rather than legal training. Since business firms are commercial enterprises, any acts they perform can usually be justified as increasing profit in some way. Spurious "good motive" defences might sound reasonably convincing to the layman.

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(3) See, for example, J.R. Baldwin et al., "Imports, Secondary Output, Price-Cost Margins and Measures of Concentration: Evidence for Canada, 1979", Discussion Paper No. 262, Economic Council of Canada, Ottawa, 1984, and the references cited therein.

(4) The "magic number" can be surprisingly small, depending on the market. OPEC produced after 1973 less than 55% of total world crude oil output and in 1984, only 30.7% of the total, but obviously controlled oil prices. With 30% as a cutoff, many Canadian industries might be under scrutiny.

One recent case which illustrates well the difficulties in anti-combines law is the Atlantic Sugar case(5). Redpath posted daily price costs for sugar in the lobby of its offices. Atlantic and St. Lawrence read these lists and produced parallel price lists. The three companies shared the whole of the eastern market until 1964, when Cartier opened. Thereafter, they shared 94% of the market, keeping their market shares in the same proportion as before 1964. There was evidence that quantity discounts varied between firms but, surprisingly, shares were constant. There was no direct evidence of explicit collusion. They were, on appeal, found not guilty of agreeing to lessen competition unduly. The concerns of commentators on this case were:

(i) the unsatisfactory investigation of the price list as a signalling device.

(ii) how competitive the quantity discounts were on the whole.

(iii) the "double intent" implied in the law of an <u>intended</u> agreement.

Taking these points in turn, the first two items show the difficulties in making judgments based on law without economic analysis. The facts of the case were clear: Redpath displayed a price list that varied daily with the international raw sugar market; its competitors saw this signal, then set identical prices. When tried under criminal law, the crucial question in such a case would be how strong was the evidence of collusion. If the object is not to punish but to restore competition, then an order prohibiting this behaviour would be sufficient. Furthermore, because the social cost of wrongly restricting the publication of a price list is substantially less than the cost of wrongly convicting someone of conspiracy, lower standards of proof could be applied. The participants

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(5) F.H. Webber, "Oligopoly and the Combines Investigation Act", <u>Canadian Business Law Journal</u>, Vol. 6, 1981-2, p. 477-480.

in a cartel or oligopoly are sophisticated economic agents, and can vary their behaviour slightly to avoid breaking the letter of the law. A buyer can be offered a range of prices by different suppliers. This does not necessarily mean that the suppliers are acting competitively. For example, if identical list pricing and uniform quantity discounts are made illegal, then list pricing with varying random quantity discounts will give the same sales revenue in the long run if the variable quantity discount is the same on average as the old fixed quantity discount. The evidence needed and appraisal will require economic, as opposed to legal, judgment.

The recent court interpretations of the word "unduly" have caused some concern on grounds of double intent and how large a reduction of competition is "undue". The interpretation seems to have altered over time. One interpretation is that the reduction in competition is undue if it results in virtual monopoly (the so-called "Cartwright Heresy") where "participants in the agreement become free to carry on those activities virtually unaffected by the influence of competition". This is very hard to prove. A milder interpretation would be merely the serious lessening of competition.

The defendants in the Atlantic Sugar case argued that the intention of their behaviour was to maintain market share, not to reduce price competition. The trial judge agreed, but was overturned on appeal. It would be unfair to criticize a trial judge for not being an economist, but this case strengthened the argument for having a qualified tribunal rather than a judge.

CHRONOLOGY OF RECENT COMPETITION REFORM

1960 - The Crown lost two important merger cases. In the Canadian Breweries case, the defendant had increased market share by merger in both Ontario and Quebec from under 20% to over 50%. In the B.C. Sugar Refining case, before the merger the defendant had held all the B.C. and Alberta markets, 93% of that in Saskatchewan and 19% of that in Manitoba. Its subsequent merger

with Manitoba Sugar gave B.C. Sugar 100% of the Saskatchewan market and 70% of that in Manitoba. The fear was that the courts were setting the extinction of competition as a standard for monopolization.

1962 - The Restrictive Trade Practices Commission reported on Tires, Batteries and Accessories (TBA). The petroleum refiners, by various means, forced the gas stations to carry only the refiner's brand(s) of auto spares and parts. Such acts were not illegal at that time.

1969 - The Economic Council of Canada produced its Interim Report on Competition Policy. The Pearson government had requested a thorough review of the Combines Act rather than a piecemeal amendment to correct the problems raised in 1960 and 1962. Competition was seen as a means of achieving economic efficiency. A tribunal was recommended to deal with mergers and restrictive practices. The Court would deal with collusion, resale price maintenance, and misleading advertising, which were thought to be of a more open-and-shut nature.

1971 - Bill C-256 was introduced to implement the E.C.C. Interim Report. Although the Interim Report had not drawn much adverse comment, C-256 was strongly attacked by business,(6) and was withdrawn. The new strategy was to divide the legislation into two stages; the first, stage I, was uncontroversial and dealt with

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(6) See I. Brecher, Canada's Competition Policy Revisited, The Institute for Research on Public Policy, Montreal, 1981, Ch. 3.

misleading advertising and promotions, resale price maintenance, refusals to deal, tying, exclusive dealing and bid-rigging. Stage II was to cover the control of monopoly and mergers. Unlike Stage I, this stage contained areas where there had been little convergence of public opinion. There was wide-spread agreement that misleading advertising was wrong, but little consensus on which mergers ought to be prohibited.

1973 - Stage I legislation was introduced. The original Bill C-227 died with the 1974 general election, and was resurrected as Bill C-7, and then finally as C-2 which came into force on January 1, 1976.

1976 - The Skeoch-McDonald advisory committee was set up to consider the issues in Stage II implementation. Its report, Dynamic Change and Accountability in a Canadian Market Economy, emphasized (some thought overemphasized) the importance of promoting dynamic change in the Canadian economy. It argued for "the prohibition of artificial restraints, that is, restraints not based on superior economic performance"(7) and the avoidance of "the trap of too much pragmatism involved in such tests as whether activity 'is in the public interest' or 'promotes competition'".(8) The report does not seem to have been an overwhelming influence on the subsequent legislation.

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(7) L.A. Skeoch, "The Dynamic Change Report and the Proposed Competition Act" in J.R.S. Prichard et al., eds., Canadian Competition Policy: Essays in Law and Economics, Butterworths, Toronto, 1979, p. 30.

(8) Ibid.

Bills C-42 and C-13 added to the high mortality rate for competition policy legislation. Bill C-42 received rough treatment in committee review,(9) and was revised as C-13 which died on the order paper.

1978 - The Bryce Royal Commission on Corporate Concentration reported that mergers, overall, were not a matter of concern for the Canadian economy.

1984 - Bill C-29 was introduced and died with the calling of a general election.

1985 - The Macdonald Royal Commission reported favouring the promotion of domestic competition by the removal of trade barriers and regulatory restrictions.

1985 - Bill C-91 was introduced.

AN OUTLINE OF BILL C-91

Bill C-91 widens the coverage of competition law to include banks and Crown corporations and adds the offence of delivered pricing. Delivered pricing is the practice of setting prices in different regions of the country that reflect the state of competition in those regions rather than transportation costs. Firms in an industry may quote prices as based on a factory price in, say, Montreal, plus transportation costs from Montreal to the client, whether or not the goods involved originated in Montreal or not. The criticisms of systematic delivered pricing are therefore: first, the practice creates an umbrella under which collusive

(9) Brecher (1981) Ch.5

price-fixing and market-sharing can flourish; secondly the benefits of competition are localized with competitive prices being charged in some parts of the country and monopolistic prices elsewhere; finally, there is no incentive for customers to choose the nearest supply source, resulting in unnecessary freightage. On the other hand some buyers in a zone can receive an implicit transport subsidy and there can be attempts by suppliers to meet the competition in price.

The Bill also splits adjudication between the criminal courts and a new Competition Tribunal. Among the responsibilities of the two bodies are:

Competition Tribunal	Courts
Refusal to deal (s.47)[10]	Conspiracy (s.32)
Consignment selling (s.48)	Bid-rigging (s.32.2)
Exclusive dealing, tied selling, market restriction (s.49)	Professional Sports (s.32.3)
	Conspiracy by banks (s.33)
Abuse of dominant position/ Monopoly (s.50)	Illegal trade practices/ Predatory pricing (s.34)
Delivered pricing (s.52)	Misleading advertising (s.36)
Refusal to supply by foreign suppliers (s.56)	Resale price maintenance (s.38)
Specialization agreements (s.57)	
Mergers (s.63)	

The Competition Tribunal will include judicial and lay members. A sitting will consist of between three and five members with each category represented. Only the judicial members will decide questions of law and

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(10) References in brackets are to the proposed sections of the Combines Investigation Act (to be known in future as the Competition Act).

both types of members will decide questions of fact or mixed law and fact. The Chairman must be a judicial member. The Tribunal can make orders prohibiting certain behaviour, and requiring divestiture of assets and shares. The Courts can, as before, impose fines and/or imprisonment. As a result of a decision of the Tribunal, the government may also cut specific tariffs to stimulate competition through increased imports. The Bill takes a behaviourist view, explicitly rejecting a reliance on concentration indices. Competition is defined to include (potential) imports and export markets.

Some of the major features of Bill C-91 are now discussed.

A. Mergers

Economists categorize mergers as horizontal, vertical, and conglomerate. Horizontal mergers occur between firms making the same product and are thus the major focus of competition policy. Vertical mergers occur when a firm and its supplier merge. Conglomerate mergers are those in which two holdings or groups of companies merge. In a pure conglomerate merger, there are no horizontally or vertically related firms in either premerger group, and so pure conglomerate mergers would have no impact on competition as assessed under Bill C-91, although they would have an effect on aggregate concentration.

The possible policy stances on mergers range between "hard" and "soft". The "hard" view relies on the difficulty of "unscrambling eggs" after a merger, pointing out that forced divestiture will result in substantial third party costs for shareholders who bought stock after the merger, and the costly reconstitution of distribution systems and production lines that have been amalgamated or closed down. The essence according to this view is to catch mergers before they occur, and to use tough standards to prejudge if such mergers are likely to be anti-competitive. The "soft" view is that screening mergers requires too much in the way of forecasting the future behaviour of the merged firm to be credible, and that the best policy therefore is not to restrict mergers but to monitor and prosecute anti-competitive behaviour after the mergers.

The major proponents of the "soft" approach are Skeoch and McDonald (1976) and the Bryce Commission (1978). Bill C-91 favours the "hard" approach. The bill applies to both horizontal (s.64(1)(a)) and vertical mergers (s.64(1)(b),(c)). The test is one of substantial lessening of competition (s.64), which is to be judged according to specific criteria (s.65) including the existence of potential entrants both domestic and foreign, and the ease of entry to the market. Concentration evidence alone is not enough (s.64(2)). These provisions reflect a more modern theory in economics that anticompetitive behaviour in a market may be disciplined by the threat of potential entry, even though that market itself is quite concentrated. The Tribunal will have to render a quite sophisticated judgment. There are exceptions for joint ventures (s.67), efficiency gains which would not have come about without the merger (s.68), and for failing firms (s.65(1)(b)).

Any merging firms may apply for an advance ruling certificate (s.74), which, if granted, prohibits the Director from forwarding the merger to the Tribunal if the merger is completed within the year after the certificate was issued and if no factors change. Large firms would have to prenotify the Director and provide information (s.86). The thresholds are that the firms have assets in Canada or gross revenues from sales of over $500 million,(11) and that the assets acquired or sales revenue generated by the assets acquired in the merger exceed $35 million. The firms may submit a minimum amount of information (s.93) and wait 7 days or may submit more detailed information on subsidiaries (s.94) and wait 21 days for the Director to decide whether to refer the merger to the Tribunal for consideration.

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(11) The Legislative Committee considering Bill C-91 has recommended an amendment reducing this figure to $400 million.

Reuben and Wilson,(12) in commenting on C-13 (1976), which had similar merger review provisions, point out that the efficiency defence might be tempered by an order with specified conditions from the Tribunal. In the case of mergers which substantially lessen competition, the Tribunal has quite wide discretionary powers (i.e. s.64(1)(e)(iii)) or s.64(1)(f)(iii)) which permit it, among other things, to alter the terms of the merger, with the consent of the parties involved. This discretion is not available in the case of a merger that lessens competition but improves efficiency.

Ex ante rulings require some comment. Once the strict structuralist view, which judges competitiveness by looking only at market shares, has been rejected, it is hard to design a compulsory prenotification scheme. If there is no magic number which can be mechanically calculated by the merging parties, then they cannot be expected to make an assessment of the factors in section 65 without bias. Instead, some imperfect mechanical number must be used. Bill C-91 uses the size of firm and size of transaction as joint thresholds, and it is very easy to find examples of questionable mergers which these joint criteria would have missed. Stanbury,(13) in commenting on C-29 (1984), gives the following examples.

- Three firms accounted for more than 75% of the waste disposal business in a major Canadian city. A merger resulted in two firms having three-quarters of the market.

- As a result of its acquisition of a competitor, a film processor in a large city increased its market share to 60%.

- The merger of two propane distributors gave the resulting firm about 80% of a regional market.

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(12) G.L. Reuben and T.A. Wilson, "Merger Policy Proposals: An Evaluation", in J.R.S. Prichard et al., (1979), p. 258.

(13) W.T. Stanbury, "Merger and Monopoly", in R.W. Lusk et al., eds., Canadian Competition Law, The Continuing Legal Education Society of British Columbia, Vancouver, 1984, p. 2.1.06.

- A merger in the poultry processing industry increased the leading firm's share to 65%. There were only two other competitors.

- The merger of two heating oil distributors in a medium-sized Ontario city brought about a 65% market share for the resulting firm.

Clearly competition was substantially lessened in each case, but the prenotification criteria proposed in Bill C-91 were not violated. It might be argued that these examples are "small fry", but they could be significant in effect in their localities. The present law does attack some very localized "small fry" abuses such as bid-rigging (s.32.2). There is a policy interest in small localized markets.

Roberts and Hewat(14) provide an interesting discussion of the threshold levels and waiting periods. They point out that the U.S. law has a threshold of one-fifth the Canadian level. They also note some administrative experience in the U.S. and Australia that suggests that 7 and 21 days may not give enough time for the Director to consider the evidence. Given recent experience the Director could expect five to ten cases of compulsory prenotification per year under the $500 million limit. Decreasing the prenotification threshold to $400 million would result in an additional two to four mergers being considered per year.

Under voluntary prenotification (s.74), the information required by the Director is not specified, nor is a time limit stated. The provisions of section 74 may not be attractive enough to persuade many firms not covered by compulsory prenotification to apply.

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(14) R.J. Roberts and C.A. Hewat, "Pre-Merger Notification in Canada", Canadian Business Law Journal, Vol. 11, 1986, p. 135-146.

B. Monopoly

Bill C-91 treats monopoly or abuse of dominant position as a civil offence under the Tribunal. The anti-competitive acts listed in proposed section 50 include squeezing, buying out a competitor's clients, freight equalization, fighting brands, pre-empting scarce resources, buying up of products to maintain prices, adopting incompatible product specifications, and restricting suppliers from selling to competitors.

Squeezing is an anticompetitive practice that a vertically integrated firm can use to spread its market power into the more competitive markets in which it operates. A firm which both markets its output through affiliated retail stores and also sells to independents can increase its wholesale price and have its affiliated retailers cut their margins to maintain sales prices. This does not really hurt the integrated firm or conglomerate, because profit is, in effect, just transferred from retail to manufacturing but it squeezes the profit margins of competing retailers.

Freight equalization is closely related to delivered pricing, now an offence (s.52) and discussed earlier in this paper. Under freight equalization, the supplier absorbs the different transportation charges in a region, thereby subsidizing some customers and taxing others. Freight equalization is an offence when used to lessen competition by creating a barrier to entry or forcing a competitor out of business. Delivered pricing is an offence when a customer is denied the ability to buy at the cheapest source and do his own transportation.

Fighting brands are used to respond to competition by introducing a new brand "selectively on a temporary basis to discipline or eliminate a competitor" (s.50(d)). The offence is thus being too strongly competitive by driving out a competitor and not sharing the benefits of lower price over a wide enough area or over a long period of time.

To make an order prohibiting any of these behaviours, the Tribunal (s.51(1)) must find that there is substantial control of the market by the parties who have been engaging in a practice of anti-competitive acts with the object of lessening competition,[15] and who, as a result of such practice, have lessened or are likely to lessen it substantially.

These sections of the bill illustrate the need for a Tribunal approach. Freight equalization and fighting brands usually result in some price cuts for some part of a market, and can be pro-competitive. It requires some sophisticated business knowledge not normally possessed by criminal courts, to make such fine distinctions. Moreover, proof "beyond a reasonable doubt", which is required in the criminal courts, is an unsatisfactorily strong standard compared to proof "on the balance of probabilities", which would be required under the Tribunal.

C. Conspiracy

Agreements to fix prices or to share markets are the most obvious attacks on the competitive process, and have constituted the mainspring of anti-combines policy in most countries. There is no controversy among economists on the need to prohibit such collusive agreements between competitors.

Bill C-91 attempts to repair the ambiguities caused by the Atlantic Sugar case by removing the double intent requirement (s.32(1.3)). To be guilty of conspiracy parties would have to intend to enter an agreement and that agreement would have to unduly lessen competition. An intent to unduly lessen competition would not have to be proved. The other major clarifications are that circumstantial evidence can be used to prove the existence of a conspiracy (s.32(1.2)), and that export consortia are allowed even if domestic competition is unduly lessened (s.32(4)). Elsewhere, (s.57), specialization agreements between competitors to rationalize production are allowed if the increase in efficiency offsets the loss in competition. Such agreements must be registered with the Tribunal.

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(15) The Legislative Committee has recommended the deletion of the phrase "and the object of the practice is to lessen competition".

The major criticism of present law and Bill C-91 relates to the "unduly" requirement.(16) Proving an agreement is not too hard, but proving the undue lessening of competition has been too much of a burden on the Crown in recent years, as Table 1 (p. 17) shows. In U.S. law, the Sherman Act makes collusion to fix prices, share markets, or bar entry illegal *per se*. The advantages of the American approach are that the law and economic theory are consistent, prosecution is easier, judicial uncertainty on the meaning of "unduly" is removed, and the judiciary do not have to assess the level of competition in a market - a task for which Bill C-91 argues they are not best qualified.

Bid-rigging (s.32.2) remains a *per se* offence; firms are just as guilty if they conspire to raise prices by 1% or 100%. Bid-rigging is most commonly undertaken by small local construction firms.(17) Before Stage 1, bid rigging was not a *per se* offence, and cases were lost for failing to meet the "unduly" criterion. The present law and Bill C-91 both make price fixing a *per se* offence in a tender market, and not a *per se* offence in a non-tender market. Conspiracy by banks to fix rates and charges, on the other hand, would be a *per se* offence (s.33).

D. Predatory Pricing

A firm acts in a predatory fashion when it prices so low as to force a competitor out of production, with the intent of then raising prices. This behaviour is only slightly removed from competitive behaviour

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(16) See, for example, W.T. Stanbury in Lusk (1984), s.3.3, C. Green, *ibid.*, Ch. 8 and D.G. McFetridge and S. Wong, "Agreements to Lessen Competition After Atlantic Sugar", *Canadian Business Law Journal*, Vol. 5, 1980-81, p. 329-345.

(17) Canada, Consumer and Corporate Affairs, "Proposals for a New Competition Policy for Canada: First Stage", Ottawa, 1973, p. 35-38.

Table 1

The Disposition of Conspiracy (S.32) Cases,
1970/71 to 1982/83

Disposition	1971-75	Year Ended 1976-80	1980-83
° Total cases referred to the Attorney General	19	28[2]	13[1]
° Cases not prosecuted	4	8	6
Results of Prosecutions			
° Non Convictions	2	9	7
- charges dropped	0	2	1
- dismissed at preliminary	2	0	1
- acquitted at trial	0	7	5
° Convictions	13	11	5
- fine only	1	1	0
- prohibition order only	7	4	3
- fine and prohibition order	5	6	2
° Conviction rate	87%	55%	42%

1. Includes Quebec concrete case in which a s.33 charge was laid but dropped when accused pleaded guilty to s.32 charges.

2. Includes 2 cases where the accused were charged under both s.32 and s.33 (monopoly), i.e., Large Lamps; Allied Chemical and Cominco.

Source: W.T. Stanbury, Lusk (1984), p. 3.3.04.

in trying to meet and undercut the competition. The policy problem is to draw the fine line between competitive and overly competitive behaviour. As might be expected, economists are far from unanimous on the fine details of testing whether a price is too low.(18)

Bill C-91 treats predatory pricing as a criminal offence (s.34). The courts have to decide whether the defendant has a "policy" of selling at an "unreasonably low" price to eliminate a competitor.

The creation of a civil tribunal with business and public affairs expertise is difficult to reconcile with leaving predatory pricing in the criminal domain. Predatory pricing is an economically complex phenomenon, hard to prove to criminal standards, and capable of remedy by a desist order instead of by a fine. Applying C-91 to some recent events does produce some anomalous results. The Director of Investigation and Research, reporting on some practices in gasoline retailing, noted that independent retailers were cutting prices because they were more efficient, had lower marketing expenses, and bought lower priced gasoline.

> In the late nineteen fifties and early nineteen sixties, the majors employed temporary allowance or consignment programmes to provide dealers with subsidies. Both tools were used to develop a systematic structure of price discrimination to discipline the independents.
>
> By the late nineteen sixties another method was adopted by the majors. In varying degrees, the majors developed strategically located chains of low-priced private brand stations. These were used as "fighting brands" to protect the majors' branded network.(19)

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(18) D.G. McFetridge and S. Wong, "Predatory Pricing in Canada: The Law and the Economics", Canadian Bar Review, Vol. 63, 1985, p. 686-733.

(19) Canada, Supply and Services, "The State of Competition in the Canadian Petroleum Industry", Vol. VI, 1981, p. 383-4.

The intent of the majors was the same during both periods, but the instruments chosen were slightly different. It is impossible to make an argument in economics that these differences were anything but trivial. Bill C-91 would have tried the offence in the first period in the courts under the predatory pricing clause (s.34), which requires criminal standards of proof and is punishable by imprisonment up to two years. In the second period, under Bill C-91 the offence would have been fighting brands (s.50(d)) before the Tribunal with an order of prohibition as the penalty. It is difficult to justify this anomaly.

E. Banks and Crown Corporations

Bill C-91 brings banks and Crown corporations within the ambit of competition law. The special position of banks in the financial system is recognized. They are allowed to exchange credit and related information without fear of prosecution (s.33(2)), and the Minister of Finance may allow mergers of banks which are in the interest of the financial system even though competition may be reduced (s.66(b)). Agreements to fix prices, charges and rates are a per se offence for banks (s.33). Previously, the Inspector General of Banks had to police the banks in these matters. Now consistent standards of judgment will be applied to banks and to non-financial companies by the Tribunal and the courts, although it should be noted that proof of conspiracy is easier to prove against banks, (as it is a per se offence for them), than against other firms. In the 1981 Eldorado Nuclear case[20], five uranium mining companies were charged with conspiracy under s.32(1)(c) of the Combines Investigation Act. Eldorado Nuclear and Uranium Canada were Crown corporations and had the charges against them dropped on grounds of Crown immunity. This was obviously inequitable; the situation is remedied in Bill C-91 which would make the commercial (but not the regulatory) operations of Crown corporations subject to the same prohibitions as those of non-Crown firms.

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(20) Green (1985), p. 303-304.

CONCLUSION

Bill C-91 is the latest in a long series of attempts to implement the Stage II reforms recommended by the Economic Council in 1969. It proposes, like its predecessors, the splitting of responsibilities between the courts and an expert tribunal which would deal with abuses of competition and mergers. It also proposes the broadening of the scope of competition law to include banks and Crown corporations.

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ACCO CANADA INC.
WILLOWDALE, ONTARIO

* INDICATES 75% RECYCLED 25% POST-CONSUMER FIBRE

*SIGNIFIE 75 % FIBRES RECYCLÉES, 25 % DÉCHETS DE CONSOMMATION

BALANCE OF PRODUCTS 25% RECYCLED

AUTRES PRODUITS: 25 % FIBRES RECYCLÉES

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